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RAUTENBACH v. GOLDFIELDS DEEP, LTD., AND MINING COMMISSIONER OF JOHANNESBURG.

HOLM v. THE SAME.

Morice, J.

the ground has not for mining purposes been enhanced in value by the buildings, it is doubtful whether the plaintiffs, even if they cause damage, can be compelled to pay compensation.

In the two cases there must, therefore, be judgment in favour of the plaintiffs. The plaintiffs are declared to be entitled to peg off the pieces of ground described in the summonses, and the Mining Commissioner is ordered to issue licences for the same. The defendant company is ordered to pay the costs of these actions.

Attorney for plaintiffs: *M. Burgess.*

Attorney for defendants: *H. L. Scholtz.*

JOOSTE

v.

THE GOVERNMENT OF THE S. A. REPUBLIC.

Coram: KOTZÉ, C.J. MORICE, J. GREGOROWSKI, J.

1896
10 *November.*
11 ,,

1897
27 *April.*

TOWN LANDS—TOWN REGULATIONS—GRAZING RIGHTS—NEW ERVEN—EXPROPRIATION.

Per *Kotzé, C. J., and Gregorowski, J.: The Government possesses no right to survey new erven on the town lands of Potchefstroom, and to grant them to persons who are entitled to burgher rights, for such new erven diminish the grazing rights possessed by the owners of existing erven over the town lands under the town regulations, although in the title deeds of these owners no mention is made of grazing rights. Expropriation of rights can only take place for the public benefit on payment of reasonable compensation.*

Per *Morice, J.* (diss.): *The Government possesses such a right, for in the title deeds of the existing erven no mention is made of a servitude of grazing over the town lands, and the Government is not obliged always to keep the town lands at the same extent in area.*

THIS was an appeal from the judgment of Ameshoff, J., delivered on 7th May, 1896. Application was made in chambers before that Judge for the confirmation of a rule *nisi* calling upon the Government to show cause why it should not be restrained from

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parcelling out a portion of the town lands of Potchefstroom into erven by way of compensation to persons who possessed burgher rights and had not obtained farms thereon. The rule *nisi* was discharged on the ground that the rights of the applicant over the town lands were not sufficiently established. Against this ruling appeal was brought. The facts of the case are fully set out in the judgment of Morice, J.

Wessels (with him *Muller*), for the appellant, referred to the *Dorps Regulaties* (Town Regulations) of 1858 (*a*), sects. 1 and 2. These two sections create a servitude over the town lands in favour of the holders of erven. He also referred to the following resolutions of the Volksraad, viz.: of 13 Oct. 1868; 14 May, 1889; 12 May, 1890; 27 May, 1891; 6 Aug. 1891, Art. 1321; Law No. 10, 1886, § 47; and Voet, 8, 3. 10.

Cloete, for the respondent: The town lands are the property of the Government. (Volksraad resolution, 14 May, 1889, Art. 86.) The Government has the right of disposing of town lands. It lies on the applicant to show there exists a right of servitude over these town lands. In this he has failed. The *Dorps Regulaties* of 1858 do not affect the present case. They do not refer to Potchefstroom. It is doubtful whether they have the force of law. Even assuming that rights of grazing exist over the town lands, no proof of any damage has been given.

Wessels, in reply: The *Dorps Regulaties* cannot be read and interpreted otherwise than that they apply to town lands already in existence as such at that time. The presumption that grazing rights exist is so strong, owing to a user for more than forty years, that the Court will presume a grant. See further, *Gluck. vol.* 10, *p.* 170.

Cur. ad. vult.

Postea. 27th April, 1897.

KOTZÉ, C. J.: I have read the judgment of my brother Morice, and cannot agree with him for the following reasons: The applicant is the owner of erven at Potchefstroom, and complains that through the giving of 800 new erven out of the town

(*a*) Lokale Wetten, 1849–85, p. 85.—TR.

lands of Potchefstroom to persons who are entitled to burgher rights, the Government has encroached upon the grazing rights which the applicant possesses, as owner of erven, over the town lands. According to the *Dorps Regulaties* of the South African Republic of 1858, which have always been recognized by subsequent laws and Volksraad resolutions as still of force, the owners of erven in the towns have the right of grazing their cattle upon the town lands and commonage. The erfholders therefore derive this right from the law, although no mention may be made in their title deeds of grazing rights. The Grondwet (*b*), sects. 6, 8 and 194, guarantees to the burgher, and every other inhabitant, his right of property. This right can, however, be expropriated for the public benefit, but only against reasonable compensation. I deduce this not merely from the above articles of the Grondwet, but also from the common law. *Van der Linden*, in his Manual, p. 59, is very clear on the point: "We lose our property," says he, "against our will, whenever we are deprived of anything through execution or by direction of the Government for the public benefit. This latter, however, cannot take place except against reasonable compensation." In support of this well-known doctrine he refers to Grotius and Bynkershoek, who entirely bear him out. The Dutch Constitution, § 147, and the Dutch Civil Code, § 625, as well as the Code Napoleon, § 545, are to the like effect. Blackstone, in the second book of his Commentaries, expresses the same doctrine; and Bluntschli, in his Staatsrecht, bk. 2, ch. 13, is of the same opinion.

That the municipality of Potchefstroom ceased to exist, and that the management of the town was entrusted to the Government can make no difference. The Government is and remains, as it were, a trustee of the town lands for the owners of the erven, and holds them in trust for the owners. There is nothing before the Court to show that reasonable compensation has been offered by the State to the erfholders of Potchefstroom, and until that has been done the rights guaranteed to them by the Grondwet, as well as by the ordinary law, cannot be taken away. The town lands of Potchefstroom are about 28,000 morgen in extent, and about 300 morgen thereof have been surveyed for the 800 new erven which the Government intends to give out. The proportion, however, of the

b Lokale Wetten, 1849-85, p. 35.—TR.

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portion surveyed with what still remains as commonage is of no consequence, for the question is one of principle and not of degree. The Government or the State cannot derive any benefit from this circumstance, for if 300 morgen can, without compensation be expropriated in this way, then 10,000 or 20,000 morgen can equally well be surveyed and given out as erven.

I am therefore of opinion that until the rights of the applicant have been expropriated for public purposes and against reasonable compensation by a definite law, he is entitled to the interdict which he seeks. The appeal must be allowed with costs.

GREGOROWSKI, J., concurred.

MORICE, J.: This case, which is an appeal from Ameshoff, J., was heard on 11th November, 1896. The application before Ameshoff, J., was for the confirmation of a rule *nisi* calling upon the Government to show cause why it shall not be restrained from parcelling out portion of the town lands of Potchefstroom as erven by way of compensation to persons who possessed burgher rights and had not obtained any farms thereon. The applicant alleged in his petition that he was owner of portions of erven at Potchefstroom, and as such he claimed an unrestricted right of grazing over the town lands; that the Government had disposed by lot of 800 erven as compensation to persons who possessed burgher rights; that such erven would encroach upon the town lands or commonage of Potchefstroom; that if the grants for these erven should be given out, the applicant, as owner of land at Potchefstroom and one of the public, would suffer irremediable loss. There is also an affidavit by M. J. van der Hoff, who states that he resided at Potchefstroom since 1847 and likewise owned property there; that he always understood and was informed that the town lands belonged to the owners of erven in the town; that he had bought his erven with knowledge of the existence of the *Dorps Regulaties* of 1858. There is a further affidavit by H. T. Steyn, who lived at Potchefstroom since 1847, and was owner of land there. He declares that the erven at Potchefstroom were given out under the condition that the rest of the town lands would be for the use and service of the erfholders, subject to the right of making roads, &c., and that each erfholder would be entitled to grazing for one span of oxen, 100 milch cows, and 200 sheep and goats for each erf.

Against this there is an affidavit by the Registrar of Deeds to the effect that no mention is made of any servitude over the town lands in the title deeds of the erven of the applicant; that as far as he is aware no mention is made of a servitude of grazing in the original titles of erven at Potchefstroom; that the town lands of Potchefstroom comprised about 28,000 morgen, and only 300 morgen had been surveyed as erven for burgher rights; that the Government had never parted with its right to survey more erven after the first establishment of towns in this Republic, and that in the towns of Potchefstroom and Pretoria more erven had been subsequently surveyed.

Ameshoff, J., set aside the rule *nisi* on the ground that applicant's rights to the town lands were not sufficiently established. From this rule appeal is brought. The applicant's case appears to rest principally on sect. 1 of the *Dorps Regulaties* of 1858, which reads as follows: "The general town lands in this Republic shall be for the use of the inhabitants of the towns as grazing lands." These regulations were not in those days approved by the Volksraad, but were always regarded as law. On the 12th May, 1890, the Volksraad resolved to declare that "the regulations for the towns in the South African Republic published by Government notice of 5th August, 1858, are and remain of force, in so far as they have not been amended by subsequent laws or resolutions of the Volksraad." The case for the applicant is further strengthened by a resolution of the Volksraad of 13th October, 1868, where a request for ground in the grazing lands of the town of Potchefstroom was refused, and it was further resolved "not to recognize or approve any sale of ground in the grazing lands of towns, which has not taken place by resolution of the Volksraad, and that in future no portion of the grazing lands of any town shall be granted away or sold." The right of the town in the town lands was also recognized in sect. 47 of the Law on Municipalities, No. 10, 1886, where it is provided that "the general village or town lands shall be considered to be the property of the town, and the management thereof shall be entrusted to the municipality." It may be mentioned that the town of Potchefstroom formerly had a municipality, but by Volksraad resolution of 14th May, 1889, it was declared that the municipality had ceased to exist and the management of the town had again been entrusted to the Government; and that all assets and property of the municipality,

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both movable and immovable, should belong to the State, and so far as concerned immovable property, should be transferred into the name of the Government. The awarding of erven as compensation for burgher rights took place in accordance with the resolutions of the First Volksraad of 27th May, 1891, Art. 154; of 6th August, 1891, Art. 1320; and of 3rd August, 1893, Art. 1235. By these Volksraad resolutions it was determined that the compensation (in lieu of burgher rights) should consist in erven "to be surveyed in the towns of the various districts where such is practicable," and that the parties entitled to rights should as far as possible receive compensation in the districts where they reside. It is indeed true that there is nothing in these Volksraad resolutions to show the intention was that the erven, awarded as compensation, should be carved out of the existing town lands, but it is difficult to say whence otherwise they could be obtained.

It thus appears that the applicant's alleged right over the town lands is not vested under the Grondwet or by original grant from the Government. It rests chiefly on the *Dorps Regulaties* of 1858 and the Volksraad resolution of 13th October, 1868. But the right created by that law and resolution appears to me somewhat vague and indefinite. What becomes of the power, which the Government or State must at one time have possessed, of surveying and giving out erven? Much of the ground considered as town lands or grazing lands can probably also have been considered as ground not yet given out as erven. There is nothing to show that a piece of ground, on the laying out of a town, was beaconed off and kept apart to be reserved in perpetuity as grazing land. We can therefore not say where the right of the erfowner over the town lands begins or ends. Moreover, even if a right has been given to the owners of erven by the *Dorps Regulaties* or the Volksraad resolution of 13th October, 1868, there exists no reason why this right cannot be reduced or at least amended by other Volksraad resolutions. The State may be obliged to leave reasonable town lands for the erfholders, but is not obliged to keep these town lands in precisely the same state or precisely of the same area as forty years ago.

With regard to the assertions of H. T. Steyn, regarding the conditions subject to which the erven were given out at Potchefstroom, these are not supported by any document, and a provisional interdict cannot be granted thereon. I am accordingly of opinion that

the applicant cannot succeed in his request for a provisional interdict, and that the appeal must be dismissed with costs.

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Attorneys for appellant: *Roux* and *Ballot*.

Attorney for respondent: *C. Eeckermann, sen.*

SKEAD *v.* FOURIE.

FRANCK *v.* FOURIE.

Coram: KOTZÉ, C.J. JORISSEN, J. MORICE, J.

SUMMONS—DEFENDANT SUMMONED IN TWO CAPACITIES.

1897

2 *June.*

A person can in one and the same summons be sued in his private capacity and as executor testamentary.

THIS was an argument on exceptions. In 1891 the defendant and his wife, since deceased, had made a mutual will, in which they bequeathed several farms to their children and to the survivor of them (the testator and testatrix). In 1894 the wife of defendant died. The children considered that they were entitled to claim transfer of the full farms bequeathed to them by the will, and H. C. Skead (born Fourie) brought an action against the defendant to obtain transfer of certain two farms bequeathed to her. The Court had in that action decided that she was only entitled to half of these farms, viz., the half accruing to her from the estate of her mother. Thereupon she and S. M. Franck (born Fourie) instituted an action against the defendant, alleging that on 8th April, 1895, the defendant had promised them, as well as the other children, that he would give them transfer of the full farms if they would sign a certain contract with respect to the mineral rights on three of the bequeathed farms. They further alleged that they had signed this contract, but that the defendant, their father, refused to give transfer to them as promised. They therefore maintained that they were entitled to the half of the bequeathed farms